BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of Court Below.

The opinion of the New Jersey Supreme Court is unreported, but may be found at pages 50-51 of the Record. Likewise the opinion on the Petition for a reargument in November 1939 is unreported (R. 57). Contrary-wise *In re Natelson* was reported (New Jersey Supreme Court), 3 N. J. Misc. 549, 129 Atl. 183. The opinion of the New Jersey Court of Errors and Appeals in this cause has not as yet been officially reported but may be found at pages 64-66 of the Record and in the New Jersey law advance sheets for June 8, 1940, at page 560 (124 N. J. Law 560).

Jurisdiction.

Jurisdiction is invoked under Section 237 of the Judicial Code (28 USCA 344b) and Rule 38 paragraph 5 (a) of this Court. The judgment appealed from the New Jersey Court of Errors and Appeals was remitted by said Court to the New Jersey Supreme Court and order filed on May 24, 1940 (R. 62), and the foregoing Petition is to be filed on August 24, 1940.

Petitioner claims that he has been denied the right to be entitled to all privileges and immunities of citizens in the several States existing under Section 2 Paragraph 1 of Article IV of the United States Constitution for the reason that R. 11 (abrogated July 5, 1940) of the New Jersey Supreme Court, as applied to foreign attorneys and New Jersey native candidates for admission to the Bar, unjustly discriminates against him, although he has

submitted to the examination and fulfilled all the New Jersey requirements.

Petitioner claims that he has been deprived of his certain property rights, that his privileges and immunities have likewise been abridged without due process of law and that he has been denied the equal protection of laws within the jurisdiction of the State of New Jersey in violation of Section 1, Amendment XIV of the United States Constitution.

Petitioner also claims he has been denied the right to acquire, possess and protect his certain property rights and of the pursuit of happiness, existing under Paragraph 1 of Article I of the New Jersey State Constitution (Appendix 3).

Petitioner claims he has been unjustly discriminated against for the reason that the New Jersey Supreme Court reversed itself and did not follow *In re Natelson* (*supra*) and that such a conflicting decision is reviewable by the United States Supreme Court which has jurisdiction (*Randall* v. *Brigham*, 7 Wall (74 U. S.) 523, 541; *Selling* v. *Radford*, 243 U. S. 46, 51, 52; *In re Cooper*, 22 N. Y. 67; *Ex parte Bradley*, 7 Wall (74 U. S.) 364, 379; *Ex parte Burr*, 9 Wheat. (22 U. S.) 529, 531).

Statement of Facts.

The Petitioner a lifelong resident of the State of New Jersey, except from December 1937 to May 1929, when he was a resident of New York, has continuously resided in New Jersey since May 1929 to date. Petitioner, a duly licensed attorney and counsellor at law of the New York Bar since April 30, 1929 and admitted to practice in this United States Supreme Court since 1937, applied for admission as attorney in the State of New Jersey under the rules prescribed by the New Jersey Supreme

Court and took the New Jersey Bar Examination for Attorney on April 13, 14, 1939. Prior to taking said examination Petitioner complied with all the rules and regulations of the New Jersey Supreme Court and of the Respondent Board of Bar Examiners. In June, 1939 Petitioner was advised by Respondent that he failed to pass said examination. In early July, 1939 Petitioner conferred with the Chairman of Respondent Board of Examiners and was told the following concerning Petitioner's examination.

> "You are the 'real tragedy' of the examination; yours is a 'twilight zone case'; your mark was such that you could have 'passed' or 'failed', but unfortunately you 'failed' to 'pass', but you have an 'excellent paper'" (R. 2).

The foregoing statements lead the Petitioner to believe that he "failed" to pass the examination by a point or fraction thereto under the required 267 points of the possible maximum 400 points on said examination. After carefully re-checking all answers on said examination, and allowing for every possible contingency, Petitioner states, as a member of the Bar of the State of New York and of the Bar of this United States Supreme Court, that it is his firm belief that his minimum rating on said examination should have been in excess of 300 points.

Of 313 applicants who took the April 1939 bar examination for admission as Attorney in New Jersey, only 143 were certified by the Respondent Board as having "passed". Upon again taking the matter up with the Respondent Board (R. 5-8) Petitioner was informed that before he would be permitted to take a re-examination at the October, 1939 term of the New Jersey Supreme Court, he would have to serve a four months' clerkship in the office of a New Jersey counsellor at law. Shortly thereafter Petitioner as a Reserve Officer was ordered to

Active Duty with the United States Army in August, 1939 on First Army Manoeuvers and was not relieved therefrom until August 26, 1939.

Petitioner's examination papers are unmarked and ungraded on their face. To the date of this Petition he has yet to be advised of the rating he was given by the Respondent Board on his said Bar Examination. All his efforts to obtain his marks from the New Jersey Supreme Court have been futile. Nor has the Respondent Board granted the Petitioner the privilege of being heard on the merits of his said examination answers. Relying on an unreported case, *In re Bayard R. Kraft*, N. J. Law Journal (1917), page 164 (Appendix 3), as a precedent (R. 3) Petitioner in September 1939 filed a petition in the New Jersey Supreme Court for a review and a re-marking of his answers on the April 1939 Bar Examination, and in the alternative if this relief were denied, for an order compelling the Clerk of the New Jersey Supreme Court to add Petitioner's name to the list of those entitled to take the October, 1939 Bar Examination for Attorney. As heretofore stated the New Jersey Supreme Court denied Petitioner's application *in toto*, failed to follow its previous ruling *In re Natelson* (*supra*), except that it stated it had reviewed the examination papers of the Petitioner but had no fault to find with the Respondent Board of Bar Examiners. The New Jersey Supreme Court, reversing its ruling in the *Natelson* case which is on all fours with that of this Petitioner (R. 5-6), insisted, for reasons unknown to petitioner that petitioner must serve a four months' clerkship prior to being permitted to take a re-examination for admission as Attorney in that State. Upon application for re-argument before the Supreme Court (R. 51-56) Petitioner's application was denied without change in result and without opinion (R. 57).

Immediately after the re-argument one of the Supreme Court Justices also remarked to Petitioner that Petitioner had an "excellent paper" on his said Bar Examination. Is such a repeated statement tantamount to an admission that petitioner has satisfactorily complied with Rule 3? (Appendix 1.)

The order of the Supreme Court was entered on January 29, 1940 (R. 58). On February 7, 1940 Petitioner appealed this decision of the New Jersey Supreme Court to the Court of Errors and Appeals in that State (R. 59).

In an opinion dated April 25, 1940 (R. 64-66) the New Jersey Court of Errors and Appeals denied Petitioner relief, merely holding that it had no jurisdiction in the matter. This ruling dismissing the appeal and the order remitting same to the New Jersey Supreme Court was filed by Petitioner on May 24, 1940 and filed in the New Jersey Supreme Court on June 5, 1940 (R. 62). Although this ruling and order are dated April 25, 1940 no copy thereof was ever served on the Petitioner, who having now exhausted his remedies in the Courts of the State of New Jersey respectfully requests this United States Supreme Court for relief in the premises. Subsequent to April 25, 1940 a personal appeal by Petitioner to the Governor of the State of New Jersey was of no avail. His Excellency, inadvertently overlooking his own powers and unmindful of the fact that the power of the New Jersey Supreme Court regarding admission of Attorneys and Counsellors at Law in that State is purely recommendatory, expressed to the Petitioner the opinion that the sole power of admission of Attorneys in that State rested with its Supreme Court.

For years it has been common knowledge that the State of New Jersey is unjustly discriminating against Coun-

sellors from the State of New York. Several eminent, matured and prominent Counsellors of the New York Bar have personally contacted Petitioner since April 1940 and stated that they took but never "passed" the New Jersey Bar Examination for admission as Attorneys; that any such examination is practically an impasse for a member of the New York bar, which is being unduly discriminated against; that regarding the admission of Counsellors from New York to the New Jersey Bar, New Jersey is virtually a "closed corporation".

In passing it is to be noted that in keeping with this stringent policy the New Jersey Legislature passed an Act effective July 1, 1939 (apparently aimed at Attorneys and Counsellors from the State most proximate to its northern boundaries) restricting the allowance of fees for legal services in New Jersey to but New Jersey practitioners and providing that the allowance of any such fees to Counsel from foreign jurisdictions must be subject to the approval of the New Jersey Courts (New Jersey Public Laws 1939, Chapter 140, Revised Statutes 2:20-9 (Appendix 3)).

One of the important grounds upon which the application of the Petitioner for a writ of certiorari herein is based on Rule 11 of the New Jersey Supreme Court (Appendix 2) and in particular its application to candidates for admission to the bar in New Jersey both prior and subsequent to February 14, 1931.

Petitioner since attainment of his majority and at all times during which he resided in New Jersey has been a voting resident of that State. He voted and still votes in Jersey City, County of Hudson, State of New Jersey. Since he has complied with all the New Jersey Supreme Court rules for admission as an Attorney, even having submitted to examination, for a license only as an Attorney, although he is a Counsellor at Law of the New York

Bar, he is of the firm opinion that he is being unjustly denied the privileges and immunities accorded to citizens of New Jersey. Petitioner as this record shows and in accordance with Rule 11 of the Supreme Court, "matriculated in an approved law school" on September 16, 1925 and graduated therefrom on June 12, 1928 (R. 23). He certainly comes within the New Jersey rules in existence prior to February 14, 1931 as referred to in Rule 11 (*supra*).

Aside from studying the New Jersey law and practicing *pro hac vice* in its Courts in *Wall* v. *Jersey City Board of Education* (119 N. J. L. 308, 196 Atl. 663) and other cases, Petitioner for over four years has made an exhaustive research of New Jersey School Law and on several occasions has been consulted as an authority on the subject by New Jersey Counsellors, Attorneys and Officials of that State. Again for reasons unknown to Petitioner upon the argument before the Supreme Court on October 4, 1939, the Court did not seem to grasp the matter. It overlooked the *Natelson* decision. It failed to consider its Rule 11 in regard to Petitioner. It characterized the Petitioner, who has over eleven years' practice as a Counsellor at Law, as a "law student".

Regarding the admission of New Jersey Counsellors to the New York Bar, Paragraph 1 Rule II of the New York Court of Appeals Rules (Appendix 4) permits the admission of New Jersey Counsellors in New York on motion without examination after five years practice in the highest court of the State of New Jersey. Of course there is no reciprosity concerning the admission of Attorneys in New Jersey. Nor does Petitioner claim there is any comity in this regard. However, of the forty-eight states in the Union and including the District of Columbia, Counsel from foreign states with certain qualifications

may be admitted in about forty states and in the District on motion and without examination. Of the eight remaining states about four require special examinations which may be waived. New Jersey is one of the four remaining States insisting upon examination of duly qualified Counsellors or Attorneys from foreign States before admission ("Rules for Admission to the Bar", West Publishing Company (1939); Martindale-Hubbell Law Digest (1940). Petitioner states that the New Jersey requirements in this regard are most unreasonable and that some Uniform Law regarding admission of attorneys in foreign states should be enacted.

On June 28, 1940 Petitioner advised the Chief Clerk of the New Jersey Supreme Court, who is also Secretary to the Respondent Board, that Petitioner intended to apply to the United States Supreme Court for a writ of certiorari in these proceedings and Petitioner accordingly at that time requested a certified copy of the entire record.

It is interesting to note that on July 5, 1940 the New Jersey Supreme Court abrogated Rule 11. Could this act by the New Jersey Supreme Court be construed as an admission that it recognizes and concedes the unconstitutionality of Rule 11 in so far as its applicability to foreign attorneys is concerned, and in particular in regard to your Petitioner?

After the New Jersey Court of Errors and Appeals refused to take jurisdiction in this cause, Petitioner could have no further recourse but to this United States Supreme Court. It is of interest to note that one of the Judges of the New Jersey Court of Errors and Appeals (R. 63) is a young man who is but recently out of Law School. Upon the entire record and the other facts and circumstances surrounding this cause, the result is conclusive that the treatment being accorded this Petitioner, as a member of the New York Bar and of the Bar of this

Supreme Court, as well as New York Counsellors in general, calls for a thorough investigation as well as judicial relief.

Because of lack of funds, Petitioner has been hampered in perfecting this appeal. However, on July 21, 1940, your Petitioner was ordered to Active Duty with the United States Army until August 17, 1940, on which date the War Department further ordered Petitioner to Extended Active Duty for an indefinite period. The result is that Petitioner has been accordingly unable to give the full time and attention he would normally give to the preparation of this Petition and Brief thereon.

Specification of Points to Be Urged.

The petitioner contends:

(1) That under Rule 11 of the New Jersey Supreme Court Rules adopted February 14, 1931, he, having "matriculated in an approved Law School" prior to that date, is not required to serve a clerkship under Rule 6(c) (Appendix 1) (decided in *In re Natelson*, 3 N. J. Misc. 549, 129 Atl. 183) which as amended is now in effect Rule 9(a) (Appendix 2); and also that he is entitled to the benefit of Rule 3 (in effect from 1905 to 1931 (Appendix 1)) which merely provides that a candidate for admission to the New Jersey Bar "shall first submit himself to an examination as hereinafter provided, and thereupon give satisfactory evidence of his learning in the law, and his knowledge of the practice thereof as established in this State". In the same breath however Petitioner emphatically and without equivocation insists he passed his said bar examination.

(2) That the last clause in Rule 11 (*supra*), is unconstitutional in that it illegally discriminates against attor-

neys from foreign states, providing for a different set of rules governing such foreign attorneys.

(3) That the decisions of the Respondent Board and of the New Jersey Supreme Court and Court of Errors and Appeals are arbitrary, despotic and not guided, exercised or regulated by a sound and just judicial discretion but are based upon unsound premises and invalid reasoning.

(4) That he has been deprived of his certain property right in said examination, denied the enjoyment of the privileges and immunities accorded to the citizens of the several States without due process of law and has been denied the equal protection of laws.

(5) That under the anomalous system of admission of attorneys to the New Jersey Bar the power of the New Jersey Supreme Court is solely recommendatory, the final decision resting with the Governor of that State; accordingly Petitioner's examination papers should have been reviewed by the highest Court. (*Randall* v. *Brigham*, 7 Wall. (74 U. S.) 523, 541; *Ex Parte Bradley*, 7 Wall. (74 U. S.) 364, 379; *In re Cooper*, 22 N. Y. 67).

Summary of the Argument.

The argument for the Petitioner may be summarized as follows:

1. Under the anomalous system of admission of Attorneys in New Jersey, the power of the New Jersey Supreme Court in this regard is but recommendatory, the Governor having the sole power to license attorneys in that State; accordingly, the order of the Supreme Court was appealable to the highest Court of the State of New Jersey.

a. Ordinarily in most jurisdictions the power to admit attorneys is vested in the Courts. New Jersey does not follow this practice.

b. Since the New Jersey Supreme Court acts judicially regarding the qualifications of a candidate for admission to the bar, an order denying the right to admission is appealable to the highest court in the state.

2. Rule 11 of the New Jersey Supreme Court Rules, insofar as it concerns the Petitioner has a twofold aspect: its lack of application to Petitioner with regard to granting him protection under the Rules existing prior to 1931, denies him the equal protection of laws; its last clause application to Petitioner unjustly discriminates against him as an attorney from a foreign state, and in this respect the Rule is unconstitutional.

a. Petitioner contends he comes within the protection of said Rule 11 (Appendix 2); petitioner should not be required to serve a clerkship in New Jersey.

b. The last clause of Rule 11 (*supra*) is highly discriminatory to Petitioner as well as all attorneys from foreign states.

3. The decisions of the Respondent Board, New Jersey Supreme Court and Court of Errors and Appeals have resulted in the Petitioner being denied under the Federal constitution his right to enjoy the privileges and immunities accorded to the citizens of the several states; he has been deprived of his certain property rights without due process of law; and he has been denied the equal protection of laws within the jurisdiction of New Jersey.

4. The power of a Court or Board of Examiners is not arbitrary and despotic; nor can the New Jersey Supreme Court make an unreasonable rule which imposes an unreasonable restraint and burden on Petitioner.

5. Petitioner has not been accorded the benefit of sound law or valid reasoning.

Argument.

I.

Under the anomalous system of admission of attorneys in New Jersey, the power of the New Jersey Supreme Court in this regard is but recommendatory, the Governor having the sole power to license attorneys in that state; accordingly, the order of the Supreme Court was appealable to the highest court in the State of New Jersey.

(a) Ordinarily in most jurisdictions the power to admit attorneys is vested in the courts. New Jersey does not follow this practice.

In that State it is uncontradicted that attorneys-at-law are not appointed, licensed or admitted to practice by the Supreme Court or by any branch of the Judicial Department of the State. They are invested with that privilege by letters-patent, issued under the Great Seal of the State by its Governor when he is assured that such licensees are possessed of the proper qualifications by a recommendation to that effect by the Supreme Court.

An interesting treatise on this subject is found in the original New Jersey Report but not the Atlantic report in *In re Branch* (1904), 41 Vr. 537, 576 (cited by the New Jersey Supreme Court and annexed to its rules (Appendix 1)), 70 N. J. Law 537, 576, 57 Atl. 431.

In that case, at page 568 (57 Atl. 435), Justice Garrison stated the following language:

> "But it is not a fact that the Supreme Court of New Jersey licenses attorneys at law or admits them to practice, and if this function has ever been exer-

cised by it, either in State or colony, I have been unable to discover the least trace of it, either as an inherited prerogative or as a statutory authorization."

At pages 570 and 435, respectively:

"The matter need not however be further pursued as it is enough for present purposes to say, what no one can contravert, that attorneys at law in New Jersey are not appointed, licensed or admitted to practice by the Supreme Court or by any branch of the Judicial Department of the State. They are invested with that privilege by letters-patent, issued under the great seal of the state by its chief executive, in language that is of itself a complete refutation of the assumption upon which the petitioners' argument is founded, viz.: 'I (the executive), being well assured of the knowledge, learning and ability of , have thought fit to constitute and appoint and by these presents do constitute and appoint him, the said , an attorney-at-law and solicitor in Chancery, hereby authorizing him to appear in all the courts of record within the said State of New Jersey and there to practice as an attorney and solicitor in Chancery according to the laws and customs of said state, for and during his good behavior in the said practice, hereby authorizing and empowering him, the said , to have and demand, take and receive such fees as are or may be by law established in the said state for any service or services which he shall or may do as attorney-at-law or solicitor in Chancery in the said state. And all judges, justices and others concerned are hereby required to admit him accordingly.'" * * *

At pages 571 and 436:

"Similarly, the examination and recommendation by the Supreme Court upon which such action is based

have no legislative antecedents, ancient or modern. The custom is *sui generis*. It originated as customs do, and has grown as customs grow, and is, both historically and constitutionally, susceptible of consideration quite apart from the question of the power of the legislature to provide some other mode of appointment, a question with which we are not now directly concerned."

At pages 575, 576 and 437:

> * * *"Such well-defined power existed, as we have seen, in the Supreme Court to examine those whom it recommended for executive license, and this power, in its relation to such recommendation and mode of appointment, is therefore, in my judgment, not subject to derogation at the legislative will."

Concerning this peculiar system of admission of Attorneys, Vice Chancellor Stevenson correctly stated *In re Raisch*, 83 N. J. Eq. 82, 86, 90 Atl. 12, 14:

> "So far as I am aware, this anomaly is not found in any other State in the Union * * *".
>
> 7 C. J. S. page 711, n. 61.

(b) SINCE THE NEW JERSEY SUPREME COURT ACTS JUDICIALLY REGARDING THE QUALIFICATIONS OF A CANDIDATE FOR ADMISSION TO THE BAR, AN ORDER DENYING THE RIGHT TO ADMISSION IS APPEALABLE TO THE HIGHEST COURT IN THE STATE.

A leading authority that an order denying the right of admission to the bar is a judicial function which is appealable to the highest court, and further that every qualified applicant has a substantial constitutional right to admission is *In re Cooper*, 22 N. Y. 67, where the New York Court of Appeals in an excellent treatment of all

the phases of the history of admission of attorneys, including that presently existent in the State of New Jersey, and in language so apropos as to warrant repetition here, states (pp. 86 *et seq.*) the following:

> "In regard to attorneys the Constitution confers the absolute right of admission upon every one possessing the requisite qualifications. The court is called upon to determine the existence of this right. It being ascertained that the applicant possesses the requisite qualifications, his admission follows as a legal necessity. It is certainly clear as a general rule that whenever the law confers a right and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature; * * *
>
> It becomes our duty, therefore, to review the order of the Supreme Court denying the right of the appellant to admission as an attorney. * * *
>
> In this state it seems that all attorneys prior to the Revolution were appointed by the Governor of the Colony (*People* v. *The Justices of Delaware*, 1 John. Ca. 182). By the Constitution of 1777 the power of appointing this class of officers was vested directly in the courts, but the Constitution of 1822 was silent upon the subject, thus leaving the matter in the direction and control of the legislature which in its next session passed an Act requiring attorneys to be licensed by the courts. * * *"

Aside from New Jersey possibly being the only state that has in vogue such a peculiar system regarding the admission of attorneys it suffices to say that the modern cry, "Ichabod, the glory is departed from Israel". (I. Samuel iv. 21) as applied to the standards of admission to the bar in many jurisdictions, has borne fruit in nam-

ing among other standards set, of approved law schools by the Council of the American Bar Association. Why not, therefore, a uniform system of admission of attorneys from Foreign states?

At the risk of prolixity, but in the interest of clarity, the following language in 66 A. L. R., 1514, is set forth:

> "The New Jersey Constitution of 1844 provides that the Supreme Court 'shall continue with the like powers and jurisdiction' as belonged to it prior to the adoption thereof. An examination of the Constitution, statutes and rules of the courts from the earliest times shows that it has never been the custom of the Supreme Court to license attorneys, but that there has been a custom since, long prior to the adoption of the Constitution of 1844 by which the Chief Executive of the State, on the recommendation of the Supreme Court, based on examination, invests applicants with the privilege of practicing law with letters patent issued under the Great Seal of the State. Inasmuch as it has always been the unchallenged function of the Supreme Court of the state to license attorneys on the recommendation of the Supreme Court, the power to determine the fitness and to recommend applicants is one of the powers which existed in that court at the time of the adoption of the Constitution and which by the terms of the constitution 'shall continue' in the Supreme Court.
>
> This power to qualify and recommend applicants being in the Supreme Court, the legislature can enact no law in derogation thereof and therefore, a statute requiring the Supreme Court to recommend certain persons without an examination is invalid. *In re Branch*" (*supra.*)

An examination of the New Jersey law discloses that even in view of the above, the New Jersey Supreme Court, irrespective of its powers, assumed, acquired, or appropriated by custom, at one time, in deviation thereof, recognized the power of the New Jersey legislature to make a law that attorneys and counsellors from foreign states should be admitted in that state without examination (New Jersey Public Laws 1894, p. 161). But these provisions were later repealed (Public Laws 1895, p. 359).

While the actual admission to practice is of itself a judicial function, nevertheless the New Jersey Supreme Court does not exercise this judicial power of admission as such. It has power only to investigate and make recommendations. A body possessing the power to investigate and make recommendations cannot for a moment be conceded the power of final control which would enable it to do indirectly that which it is forbidden to accomplish directly. The action of the Supreme Court, therefore, should be reviewable by higher authority.

The New Jersey Court of Errors and Appeals is the court of last resort in all causes in that state (New Jersey Constitution, Sec. 1, Art. VI (Appendix 3)). That Court has heretofore entertained appeals in matters relating to the rights of attorneys to practice.

In re Hahn, 85 N. J. Eq. 510, 96 Atl. 589;
In re Cosey, 85 N. J. Eq. 599, 96 Atl. 595.

II.

Rule 11 of the New Jersey Supreme Court Rules, in so far as it concerns the Petitioner, has a twofold aspect; its lack of application to Petitioner with regard to granting him protection under the rules existing prior to 1931, denies him the equal protection of laws; its last clause application to Petitioner unjustly discriminates against him as an attorney from a foreign state, and in this respect the rule is unconstitutional.

(a) Petitioner contends he comes within the protection of said Rule 11 (Appendix 2); Petitioner should not be required to serve a clerkship in New Jersey.

Petitioner contends he comes within the protection of said Rule 11 (Appendix 2) and should be given the benefits of the New Jersey Supreme Court rules in existence prior to February 14, 1931, and in particular should be entitled to the protective provisions of Rule 3 (Appendix 1) inasmuch as Petitioner "matriculated in an approved law school" on September 16, 1925, graduating therefrom on June 12, 1928, long prior to the promulgation of Rule 11 in 1931 (R. 23). Accordingly, therefore, Petitioner is not required to serve any clerkship in the State of New Jersey, especially under Rule 6 (c) (Appendix 1), as was decided in *In re Natelson*, 3 N. J. Misc. 549, 129 Atl. 183, which Rule (6 (c)) is now in effect Rule 9 (a) (Appendix 2). This matter, as far as the *Natelson* decision goes, is *stare decisis*.

The *Natelson* case (*supra*) is on all fours with that concerning the Petitioner's. The New Jersey Supreme Court held in that case that Rule 6 (c) (Appendix 1) did not apply to an Attorney from another state who

sought reexamination without filing a certificate of clerkship when such Attorney practiced in another jurisdiction (New York) at least ten years.

The *Natelson* case was further cited with approval by the Supreme Court in *In re Meigs*, 9 N. J. Misc. 234, 153 Atl. 102, where the court stated, at page 235:

> "The Natelson decision relates only to such applicants as have a record of ten years or more practice in another state."

Likewise, by the same token, Petitioner contends he comes within the protective provisions of Rule 3 (Appendix 1), which merely provides that a candidate for admission to the New Jersey bar "shall first submit himself to an examination as hereinafter provided, and thereupon give satisfactory evidence of his learning in the law, and his knowledge of the practice thereof as established in this state". In the same breath however, Petitioner emphatically insists he "passed" his said bar examination.

Can it be logically and correctly stated that Petitioner has not complied with the requirements of this rule? (Reference is made herewith to Point IV (Appendix 5).) Even a cursory examination of his answers to the bar examination questions will show that he has fulfilled the requirements of the rule in every respect. His knowledge, learning and ability have trained him for so doing. His eleven years' practice as a Counsellor has "schooled" him in the law. Aside from studying the New Jersey law in general, familiarizing himself with its various statutes, decisions and practice, forms of pleading, etc., he is not without experience in practice before its Courts. He has practiced both before its Supreme Court and its Court of Errors and Appeals, *pro hac vice*. (*Wall* v. *Jersey*

City Board of Education, 119 N. J. L. 308, 196 Atl. 663.) He has conducted several other cases in the State of New Jersey. Petitioner has made a research of New Jersey School Law for over four years and has on numerous occasions been consulted as an authority on same by New Jersey Counsellors at Law, Attorneys and Officials of that State.

The statement of the Chairman of the Respondent Board, as well as that of one of the New Jersey Supreme Court Justices after the motion for reargument, to the effect that Petitioner had "an excellent paper on his examination" (R. 2, 3) seem to preclude the Respondent from further urging that the Petitioner has not met the New Jersey requirements for admission.

The Petitioner's remedy is established by precedent. *In re Kraft*, N. J. Law Journal 1917, p. 164 (Appendix 3).

(b) THE LAST CLAUSE OF RULE 11, ADDED BY THE SUPREME COURT IN OCTOBER 1931, IS HIGHLY DISCRIMINATORY TO THE PETITIONER AS WELL AS TO ALL ATTORNEYS FROM FOREIGN STATES, AND, CONCLUSIVELY SO, IN THAT IT SETS UP A DIFFERENT SET OF RULES REGARDING THEM AS IS APPLIED TO NATIVE NEW JERSEY CANDIDATES FOR ADMISSION TO THE BAR.

The direct application of this portion of Rule 11 to the Petitioner resulted in denying him the privileges and immunities guaranteed to citizens in the several states under Sec. 2, par. 1 of Art. IV, and Sec. 1 of Amendment XIV of the United States Constitution, and deprives him of his certain property right without due process of law, and also denies him the equal protection of laws within the jurisdiction of New Jersey, as provided for in the last mentioned Amendment. These provisions of the Federal Constitution are discussed in Argument III herein. (Also

in this connection reference is made to Point II (Appendix 5).)

Rule 11 is repugnant to the Federal and New Jersey Constitutions and void. (Sect. 34, Chap. 147, N. J. P. L. 1900, N. J. R. S. 2:27-149.1.)

III.

The decisions of the Respondent Board, New Jersey Supreme Court and Court of Errors and Appeals have resulted in the Petitioner being denied under the Federal Constitution his right to enjoy the privileges and immunities accorded to the citizens of the several states; he has been deprived of his certain property rights without due process of law; and he has been denied the equal protection of laws within the jurisdiction of New Jersey.

(a) PETITIONER IS ENTITLED TO ENJOY THE PRIVILEGES AND IMMUNITIES ACCORDED TO THE CITIZENS OF THE SEVERAL STATES.

All the authorities and decisions dealing with the above statements are in accord.

The right to engage freely in a lawful occupation is protected by the New Jersey Constitution (Sec. 1, Art. I, Bill of Rights (Appendix 3)). Likewise, the right to the pursuit of happiness is preserved in that state. *Brennan* v. *United Hatters* (Court of Errors and Appeals), 73 N. J. L. 729, 65 Atl. 165.

In *Cummings* v. *State of Missouri*, 4 Wall. (71 U. S.) 277, 320, Justice Field, in delivering the opinion of the court, says:

> "The learned counsel does not use these terms—life, liberty and property—as comprehending every

right known to law. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors."

Dent v. *West Virginia*, 129 U. S. 114.

In *Ex Parte Garland*, 4 Wall. (71 U. S.) 333, 379, the same justice, speaking of the office of an attorney, stated:

> "It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

In *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 506, 507, it has been held that the Constitution is violated when persons engaged in the same business or profession are subjected to different restrictions.

Any classification, to have the virtue of constitutional generality, must rest upon distinctions that are substantial and not merely illusory. *Raymond* v. *Teaneck Township*, 118 N. J. L. 109, 111, 191 Atl. 480.

If a statute or rule granting an exemption has the effect of conferring on certain persons privileges or immunities not granted to other persons similarly situated, it is unconstitutional. *In re Branch*, 41 Vr. 535, 576, 41 N. J. L. 535, 576, 57 Atl. 431. (Appendix 1, footnote.)

The pursuit of any legitimate occupation is recognized under our government. Such a right is a natural, essential and inalienable right, and is protected by the Federal and various state constitutions * * * and included in the constitutional guarantees of due process of law.

16 C. J. S., pp. 625 *et seq.*, Secs. 212, 224.

For the New Jersey Supreme Court to require Petitioner to serve a four months' clerkship and give up the

practice of his profession in the State of New York, from which he derives his income, would have the effect of reducing such applicant foreign attorneys to the class of the wealthy.

The provisions of the Fourteenth Amendment to the Federal Constitution declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, etc. * * * and prohibiting the enactment of laws granting any special or exclusive privileges, immunities or franchises * * * render void all State statutes (or rules) which make any unreasonable or arbitrary discrimination between different persons or classes of persons. 16 C. J. S., p. 954, Sec. 489; *In re Chicago, R. I. & P. Ry. Co.*, 90 Fed. (2d) 312, 113 A. L. R. 487; *Raymond* v. *Teaneck Township* (*supra*); *Phelps* v. *Board of Education*, 115 N. J. L. 310, 180 Atl. 220, 300 U. S. 319.

This distinction extends to and includes citizens of other states as well as non-residents. 16 C. J. S., pp. 988, 989, Secs. 502, 503; *Blake* v. *McClung*, 172 U. S. 239.

In New Jersey it has been held that the right to practice law is a property right which is protected. *Unger* v. *Landlord's Management Corp.*, 114 N. J. Eq. 68, 69, 70, 168 Atl. 229. The right to practice law is earned by hard study and good conduct. *Bradwell* v. *Illinois*, 16 Wall. (83 U. S.) 130; 6 C. J., p. 569, N. 36; *Matter of Co-Operative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15; *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777; *State ex rel. Shackleford*, 241 Mo. 592, 145 S. W. 1139.

In connection with the last clause in Rule 11 (Appendix 2), Petitioner makes the following comment. For the New Jersey Supreme Court to enact a rule forbidding a

man the enjoyment of his own house without the consent of an arbitrary Board of Examiners is no more unjust than to provide that a man with proper qualifications shall not enjoy the benefits of an established practice without a like consent. In either case he is deprived of his vested rights and property by a process rather ministerial than judicial and wholly different than that which is meant by due process of law, the judgment of his peers or the law of the land. His land cannot be taken away from him except by intervention of an impartial jury of his countrymen; his hard-earned reputation and professional practice should not be less secure.

Speaking of Sec. 1, Amendment XIV, of the Federal Constitution, this Supreme Court in the *Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36, 77, declared:

> "Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

(b) PETITIONER HAS BEEN DEPRIVED OF HIS CERTAIN PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

Deprivation of property without due process of law includes the property of pursuing a law profession and the right to earn a living by the practice of law. 16 C. J. S., pp. 1195, 1197, sec. 599; *Lynch* v. *United States*, 292 U. S. 571; *Cameron* v. *International Alliance*, 118 N. J. Eq. 11, 176 Atl. 692; 97 A. L. R. 594. Unlawful and unusual restrictions on lawful occupations and interfering with private business are prohibited. *Lawton* v. *Steel*, 152 U. S. 133, 137; *Smith* v. *State of Texas*, 233 U. S. 630;

Meyer v. *Nebraska*, 632 U. S. 390, 399; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 514.

The decisions of the New Jersey tribunals regarding Petitioner have resulted in depriving him of his property rights without due process of law in that petitioner never received his examination rating. Accordingly, therefore, he had no opportunity to defend an erroneous grading. It would appear that the action of all said tribunals is arbitrary, despotic and not based upon sound premises and valid reasoning. Therefore it is condemnable, especially after taking into consideration Petitioner's eleven years active practice as a Counsellor in the State of New York.

In *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U. S.) 235, 244, this court held that the principle of due process, fundamental in social compact and also made the subject of express constitutional precept, secures the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice.

(c) Petitioner has been denied the equal protection of laws within the jurisdiction of New Jersey.

It is well settled by the repeated decisions of this Court that the equal protection of the laws guaranteed by the Federal Constitution and the Bill of Rights of some states is the treatment alike, in the same place and under like circumstances and conditions, of all persons subjected to state legislation. This clause is a pledge of the equal protection of laws or the protection of equal laws. 16 C. J. S., p. 988, sec. 502; *Truax* v. *Corrigan*, 257 U. S. 312; *Yick Wo* v. *Hopkins*, 118 U. S. 356. In *Burns Baking Co.* v. *Bryan*, 264 U. S. 506, 507, it has been held that the Constitution is violated when persons in the same class

or business are subjected to different restrictions and hence deprived of the equal protection of laws. In *In re Van Horn*, 74 N. J. Eq. 600, 601, 602, 70 Atl. 986, it was held that those similarly situated should not be subjected to anything arbitrary and capricious in violation of the Constitution of the State of New Jersey.

IV.

The power of a court or Board of Examiners is not arbitrary and despotic; nor can the New Jersey Supreme Court make any unreasonable rule which imposes an unreasonable restraint and burden on Petitioner.

In *Ex parte Secombe*, 19 How. (U. S.) 9, 13 Chief Justice Taney said:

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. *The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court * * *; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion*, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." (Italics ours.)

Only reasonable restrictions can be imposed on the practice of law, especially where one has met the prescribed test. *Brydonjack* v. *State Bar*, 208 Cal. 439, 281 P. 1018; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A. L. R. 1059; 16 C. J. S. 930.

The power of courts to make such rules as they deem necessary is subject to limitation that such rules must not contravene a statute or organic law. The Court cannot adopt a different rule (viz. Rule 11 (Appendix 2)) and apply it retroactively to the prejudice of counsel or any party subject to its jurisdiction. Rules of the Court must be considered as operating prospectively only and any rule applying to past transactions, which takes away rights to which before the adoption of the rule a person was entitled, must be regarded as void.

7 R. C. L. 1024, 1027;
41 A. S. R. 643.

Courts may make only reasonable rules and regulations for admission to the bar. *In re Cate*, 273 P. 617, Supplementing Opinions in 270 P. 968 and 271 P. 356. *In re McDonald*, 200 Ind. 424, 164 N. W. 261; *In re Raisch*, 83 N. J. Eq. 82, 90 Atl. 12.

A rule must not be arbitrary and unreasonably interfere with the rights of individuals. *In re Anderson*, 69 Neb. 686, 96 N. W. 149; *Lawton* v. *Steel*, 152 U. S. 133; *Conn. Co.* v. *Stamford*, 95 Conn. 66, 110 Atl. 453; *Price* v. *Illinois*, 238 U. S. 446; *Watchung Lake Inc.* v. *Mobus*, 119 N. J. L. 272, 196 Atl. 223; *In re Egan*, 24 S. D. 301, 123 N. W. 478.

While powers of a Board of Bar Examiners are merely recommendatory, a court will not exercise its power in contravention to an adverse recommendation of the Board, unless a convincing showing is made not based upon sound premises and valid reasoning. *Spears* v. *State Bar*, 211 Cal. 183, 249 P. 697; 28 A. L. R. 1146; *Salot* v. *State Bar*, 45 P. (2d) 203. Or unless the case is outside discretion, is irregular, or against law or of flagrant injustice. *Ex parte Bradley*, 7 Wall. (U. S.) 379; *Ex parte Crane*, 5

Peters (U. S.) 190; *Ex parte Burr* (*supra*). Nor is the Court's power arbitrary, or to be exercised at the pleasure of the Court, or from passion, prejudice or personal hostility, but it is the duty of the Court to exercise and regulate its power by a sound and just judicial discretion. *In re Crumb*, 103 Or. 296, 204 P. 948; *In re Hosford*, 62 S. D. 374, 252 N. W. 843; 6 C. J. 572, n. 62; *In re Bowers*, 137 Tenn. 193, 194 S. W. 1093; *Rosenthal* v. *State Bar*, 116 Conn. 407, 165 Atl. 211; 87 A. L. R. 991; *Matter of Backus*, 136 N. Y. S. 484. Where a Board of Examiners renders a decision not based on sound premises, it will be reversed. 28 A. L. R. 1140; 72 A. L. R. 928.

In *Dent* v. *West Virginia*, 129 U. S. 114, this Court held that a State could exact only reasonable tests as to qualifications of applicants to engage in a public calling.

A law prescribing conditions for engaging in a particular business or profession is void where it arbitrarily and unreasonably discriminates between persons similarly situated or in favor of residents as against non-residents. 16 C. J. S., p. 930, sec. 468; *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *Ideal T. Co.* v. *Salem*, 77 Or. 182, 150 P. 852.

In all, it would appear that the decisions of the New Jersey tribunals, regarding Petitioner, were more of expediency than of law.

V.

Petitioner has not been accorded the benefit of sound law or valid reasoning.

As appears from the "Rules for Admission to the Bar in the Several States", West Publishing Co., 1939 (copies of which are filed herewith), which is recognized as an authority in *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007,

only approximately four States of the Union require examination before the admission of foreign Attorneys. Since Petitioner is a Counsellor of eleven years' standing in New York, why was he not permitted to take the New Jersey Counsellor's examination instead of the examination only as Attorney? Is an element of proportion missing?

The State in which Petitioner is admitted, grants admission to New Jersey Counsellors after but five years' experience in New Jersey (New York Court of Appeals, Rule II (Appendix 4)). Why not reciprocity in New Jersey, in which State in 1939 a Bill was drawn to admit original Washington, D. C., Counsel on motion? Why, because of expediency—New Jersey Counsel could not qualify under the District's reciprocal rules.

In other important States in the Union, such as Connecticut, Michigan, Tennessee, Pennsylvania, Alabama, Kentucky and Massachusetts, *et al.*, qualified foreign attorneys are admitted on motion and without examination.

If the only fear is that Petitioner, upon admission, might not maintain an office in New Jersey, this is easily remedied. Petitioner asserts that as an officer of the Court he has presented satisfactory evidence (his creditable examination papers) of sufficient legal learning and knowledge of practice in New Jersey and therefore is entitled to be admitted in that State. *Ex parte Robinson*, 19 Wall. (86 U. S.) 505, 512 (Points II and IV (Appendix 5)). He has more than substantially complied with the New Jersey requirements; but discrimination predominates. The New Jersey Supreme Court refused to follow *In re Natelson* (*supra*), and upon notice of this within application for a writ, abrogated Rule 11.

Petitioner believes he is of sufficient knowledge, learning an ability to practice in New Jersey and again sub-

mits his answers on examination sustain this assertion. Petitioner's fate is in the hands of this Court. He rests.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that basic rights under the Constitution of the United States must be preserved. Accordingly I ask that a writ of certiorari should be granted, and that this Court should review and reverse the decisions of the New Jersey courts and, if necessary, remand the matter to the appropriate New Jersey Court for further proceedings not inconsistent with the opinion of this United States Supreme Court.

Respectfully submitted,

WILLIAM G. WALL,
Attorney in pro. per.,
A member of the Bar of the United States Supreme Court.

New York, N. Y., August 22, 1940.